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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 518

WILLIAM A. CROWE,
Trading as William A. Crowe Company, *Petitioner*

vs.

RAGNAR BENSON, INC.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
1. There is a Conflict Among the Courts of Appeals as to Whether or Not an Order Entered Arbitarily, Capriciously and With Abuse of Discretion in Setting Aside a default Judgment is Final and Therefore Appealable to the Court of Appeals	5
2. The Lower Court's Arbitrary and Capricious Act and Abuse of Discretion on Opening and Vacating Said Civil Judgment Calls for the Exercise of Your Honorable Court's Power of Supervisions and Conflicts with the Decision of Your Honorable Court in *Phillips vs. Negley*, 117 U. S. 665, 6 S. Ct. 901	5
ARGUMENT	6
CONCLUSION	8
CERTIFICATE OF SERVICE	16
APPENDIX A—Majority Opinion of the Court of Appeals dated August 13, 1962	9
APPENDIX B—Dissenting Opinion of Circuit Judge McLaughlin dated August 13, 1962	12
APPENDIX C—Statutes and Rules of Civil Procedure: 28 U. S. C. A. S 1291	15
28 U. S. C. A. Rule 60 (b)	15

CASES CITED

	Page
Altrichter vs. Shell Oil Co., 263 F.2d 377	7
Darlington vs. Studebaker-Packard Corp., 261 F.2d 903	7
General Telephone Corp. vs. General Telephone Answering Service, 277 F.2d 919	6
Phillips vs. Negley, 117 U. S. 665, 6 S. Ct. 901	7
Russell vs. Cunningham, 279 F.2d 797	7
Tozer vs. Krause Milling Co., 189 F.2d 242	6
Tsai vs. Rosenthal, 297 F.2d 614	7
U. S. vs. Agne, 161 F.2d 331	6
Western Union Telegraph Co. vs. Dismang, 106 F.2d 362	6

STATUTES CITED

	Page
28 U. S. C. A. § 1254 (1)	2
Supreme Ct. Rule 19 1(b)	2
28 U. S. C. A. 1291	15
28 U. S. C. A. Rule 60(b) Federal Rules of Civil Procedure	15

IN THE

Supreme Court of the United States

October Term, 1962

No.

WILLIAM A. CROWE, Trading as William A. Crowe Company, *Petitioner*

vs.

RAGNAR BENSON, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

William A. Crowe, trading as William A. Crowe Company, your petitioner, prays that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit dismissing petitioner's appeal taken from the judgment of the United States District Court for the Western District of Pennsylvania.

OPINION BELOW

The Opinion of the Court of Appeals has not yet been reported. A copy of the majority opinion constitutes Appendix A to this petition for a Writ of Certiorari. A copy of the dissenting opinion of Circuit Judge McLaughlin is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1962, and petitioner filed a Petition for Rehearing which was denied by the Court of Appeals for the Third Circuit on September 10, 1962. The jurisdiction of this court is invoked under 28 U. S. C. A. 1254 (1) and Supreme Court Rule 19 1(b).

QUESTION PRESENTED

When a District Court Judge abuses his discretion and acts arbitrarily in vocating a default civil judgment, is the order vocating the judgment appealable to the Court of Appeals?

CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED

The statutes and rules of Civil Procedure are set out as Appendix C.

STATEMENT OF THE CASE

The complaint in this civil suit was filed on June 6, 1960. The summons was duly served on June 7, 1960. After service, an attorney, saying, he represented the defendant, telephoned petitioner's attorney and asked him for an extension of time to answer. Petitioner's attorney said that he would agree to any reasonable extension of time. The other attorney sent a letter to petitioner's attorney, saying, he would have an order, prepared to be executed by the Court and signed by petitioner's attorney, the early part of the week beginning June 20, 1960. This was not done and no answer or other pleadings were filed on behalf of the defendant. The Clerk of the District Court advised the defendant corporation of this fact, and also that the case would be called for trial in January or February of 1961. The Clerk told defendant corporation there was no appearance entered for it and suggested that the defendant corporation obtain counsel. Petitioner's attorney was notified by the Clerk that the action would be tried during the week of February 13, 1961. On that date, almost eight months from the inception of suit, petitioner, pursuant to the Federal Rules of Civil Procedure, secured a default and the entry of a judgment by default in the amount of $35,603.37. Notice of the entry of said judgment was mailed to defendant corporation by the Clerk of the District Court.

There were no further proceedings until six months later when execution was issued. It was only after that, on September 8, 1961, that the attorney entered an appearance on behalf of the defendant and moved to vacate the judgment under Rule 60(b) of the Federal Rules of Civil Procedure.

Thereafter there was an informal argument on said motion before the District Court Judge. There was on testimony. That procedure was directly contrary to Rule 5 of the Local Rules of the District Court, which

required that the motion be assigned to the next session of the particular branch of the court. In the course of the informal proceedings, the District Judge stated: "I think counsel for the defendant was groosly derelict in duty in not complying with the provisions of law as they exist in the United States Courts." He further said, "Should the Court exercise discretion and grant relief where a defendant flagrantly fails to comply with the rules of this Court and flagrantly pays no attention to letters that go out from the Clerk of Court and a default judgment is entered?" The District Court Judge then entered an order vacating the judgment on the condition that the petitioner's attorney be paid $750.00 In the order setting aside the judgment, the District Judge gave as his reason: "For the reasons set forth in hearing held September 12, 1961."

On September 26, 1961, petitioner appealed from the order reopening the judgment and the appeal was duly docketed in the Court of Appeals for the Third Circuit. The original record of the litigation was promptly mailed by the Clerk of the District Court to the Third Circuit Court for filing. On November 13, 1961, while the case was on appeal to the Third Circuit, the District Court Judge entered an order in the matter postponing a pretrial conference. In that order the court said, "* * * it was my judgement that the interests of justice required that said default judgment be lifted." This was the first and only time such reason was assigned by the court to its order of more than a month previous.

Within the time required by the Rules of the Third Circuit Court of Appeals, petitioner filed with the Clerk of the Court of Appeals, at Philadelphia, the printed briefs and appendices for appellant. After proper service and subsequent to the filing of the briefs and appendices by your petitioner, and after notice, defendant-appellee presented to the Third Circuit Court at a regular motion day on December 18, 1961, a motion to dismiss the appeal for the reason that the appeal was interlocutory and not

final and that the Third Circuit Court was without jurisdiction. On January 9, 1962, the Third Circuit Court of Appeals denied said motion and on January 9, 1962, disposed of the case on the merits by affirming the judgment of the District Court.

The Circuit Court of Appeals granted petitioner's Petition for Rehearing vacated its judgment and heard the case on the merits before a division of the Court consisting of Judges McLaughlin, Kalodner and Hastie. The Court, in an Opinion by Circuit Judge Kalodner dismissed the appeal holding that the order of the District Court vacating the default judgment was a nonappealable interlocutory order, and that the Circuit Court was without jurisdiction. Circuit Judge McLaughlin dissented, holding that the District Court Judge's order setting aside the judgment in this case was an abuse of discretion and arbitrary, and therefore it was appealable.

Petitioner presented a Petition for Rehearing which was denied on September 10, 1962.

REASONS FOR GRANTING THE WRIT

1. There is a Conflict Among the Courts of Appeals as to Whether or Not an Order entered Arbitrarily, Capriciously and With Abuse of Discretion in Setting Aside a Default Judgment, is Final and Therefore Appealable to the Court of Appeals.

2. The Lower Court's Arbitrary and Capricious Act and Abuse of Discretion in Opening and Vacating Said Civil Judgment Calls for the Exercise of Your Honorable Court's Power of Supervision and Conflicts With the Decision of Your Honorable Court in *Phillips vs. Negley*, 117 U. S. 665, 6 S. Ct. Rep. 901.

ARGUMENT

In the case at bar the Court of Appeals for the Third Circuit was divided two to one on the issue as to whether or not the appeal was from a final order. Judge McLaughlin held that under the authority of the Third Circuit's own case of *Tozer vs. Krause Milling Co.*, (3 Cir. 1951), 189 F.2d 242, the order of the District Court was appealable while the majority of the court were of the opinion that the order of the District Court in vacating the default judgment was not appealable, citing its own earlier case of *United States vs. Agne*, (3 Cir. 1947) 161 F.2d 331.

Granting certiorari in the present case will give this Court an opportunity to resolve the conflict between the various Circuit Courts of Appeals on this point, and also serve to correct the Third Circuit Court of Appeals as to what is the law in the Third Circuit on the subject.

There is a conflict among the Circuits as to whether an order opening a default judgment entered arbitrarily and by a Judge who abuses his discretion is final and appealable. The 10th Circuit and the 5th Circuit have held that an order opening a default judgment which involves an abuse of discretion or is arbitrary is an error of law, and, therefore, final and appealable.

The 10th Circuit, in the case of *Western Union Telegraph Company vs. Dismang*, (1939) 106 F.2d 362, states as follows, page 362:

> "An application to open, vacate or set aside a judgment is within the sound legal discretion of the trial court and its action will not be disturbed by an appellate court except for a clear abuse of discretion. It is an abuse of discretion, however, to open or vacate a judgment where the moving party shows no legal ground therefor or offers no excuse for his own negligence or default. * * *"

The 5th Circuit, also has decided that such an order

is appealable in the case of *General Telephone Corporation vs. General Telephone Answering Service*, (1960), 277 F.2d 919, wherein the Court states in the language of the syllabus 2:

> "Exercise of discretion by Federal District Court in granting or denying motion of defaulting party to vacate default judgment will be interferred with by Court of Appeals only if there is an abuse."

The 8th Circuit in the case of *Altrichter vs. Shell Oil Company*, 263 F.2d 377, has decided that an abuse of discretion by a District Judge is error of law and reviewable by the Circuit Court of Appeals.

The 8th Circuit in *Tsai vs. Rosenthal*, 297 F.2d 614, stated the rule as follows:

> "Where the jurisdiction of the court to vacate judgment and grant a new trial is challenged, an appeal will lie to review the power or jurisdiction of the court to make such order. Phillips vs. Negley, 117 U. S. 665, 6 S. Ct. 901, 29 L. Ed. 1013; Cooper vs. Midwest Feed Products Co., supra; Jackson vs. Wilson Trucking Corp., 100 U. S. App. D. C. 106, 243 F.2d 212; Kanatser vs. Chrysler Corp. 10 Cir., 199 F.2d 610; City of Manning vs. German Ins. Co., 8 Cir., 107 F.52."

The 7th Circuit in the case of *Darlington vs. Studebaker-Packard Corp.*, 261 F.2d 903, has held such action by a District Judge is appealable in the following language:

> "* * * It is well established that such a motion is addressed to the sound legal discretion of the trial court and courts of appeal have frequently reviewed the exercise of such discretion, holding that the ruling on the motion will not be disturbed upon appeal except for an abuse of this discretion. * * *"

The 9th Circuit in the case of *Russell vs. Cunningham*,

279 F.2d 797, has recently held that an order denying a motion to vacate under Rule 60(b) is Reviewable on Appeal and will be set aside if an abuse of discretion is found.

The lower court lacked the power to vacate the default judgment which had been entered approximately seven months prior to any motion for relief. The application to vacate the judgment was made under Rule 60(b) of the Federal Rules of Civil Procedure. Since the court did not find any mistake, inadvertence or excusable neglect or any other legal or equitable reason for vacating said judgment, the court lacked the power to vacate or open the same. See *Phillips vs. Negley*, 117 U. S. 665, 6 S. Ct. 901.

Furthermore, petitioner was denied due process in that the matter was not set down for hearing, after answer, as provided for by Local Rule No. 5 of the District Court for the Western District of Pennsylvania. Such arbitrary action on the part of the District Judge calls for the supervision of your Honorable Court.

CONCLUSION

There being a conflict of decisions between the present decision of the 3rd Circuit Court of Appeals and that of the 5th Circuit and 10th Circuit and the other Circuits cited above on the same matter, and in order to correct an error of law and the arbitrary administration of justice, we respectfully submit that this petition for Writ of Certiorari should be granted.

VINCENT M. CASEY

Attorney for Petitioner

OPINION OF THE COURT

(Filed August 13, 1962)

APPENDIX A

By KALODNER, *Circuit Judge*

This is an appeal by the plaintiff, William A. Crowe, Trading as William A. Crowe Company, from an Order of the District Court for the Western District of Pennsylvania, vacating a default judgment in his favor in the amount of $35,603.37 against the defendant, Ragnar Benson, Inc., in a suit to recover for services performed under a contract between plaintiff and defendant in connection with the construction of the Gateway Park Garage, Gateway Center, Pittsburgh, Pennsylvania.

The complaint in this suit was filed on June 6, 1960. There followed a telephone conversation and an exchange of letters between plaintiff's counsel and defendant's counsel in which the former agreed to consent to a reasonable extension of time for the filing of an answer. Defendant's counsel was to prepare the necessary order for submission to the Court. The proposed order was never prepared. On December 29, 1960, the Clerk of the Court directly notified defendant by letter that the case would be called for trial in January or February, 1961. During this period defendant's counsel was unable to devote full attention to his practice because of serious illnesses of his mother and his wife. On February 13, 1961, no appearance having been entered by counsel for defendant and no answer having been filed, the Clerk of the Court entered judgment by default pursuant to plaintiff's application to do so. On September 8, 1961, following the issuance of a writ of execution on August 31 and the commencement of garnishment proceedings against defendant's bank accounts, defendant's counsel filed a motion to vacate the default judgment under Rule 60(b), Federal Rules of Civil Procedure, 28 U. S. C. A., and to stay the garnishment proceedings.

On September 13, following hearing had on the previous day, the District Court entered an Order granting defendant's motion to vacate the default judgment and terminating the garnishment proceedings conditioned upon defendant's payment to plaintiff's counsel of the sum of $750.00 within 24 hours. The Order further directed defendant to file an answer to plaintiff's complaint by September 18 and fixed November 13 for a pre-trial conference.

On September 13 defendant's counsel sent his check for $750.00 to plaintiff's counsel. On September 14 plaintiff's counsel advised the Clerk of the District Court of his receipt of the aforementioned check.* On September 18, the Clerk, pursuant to the terms of the District Court's Order, vacated the default judgment entered February 13, 1961. On September 26 plaintiff appealed. Subsequently, on November 13, the District Court entered an Order postponing until after disposition of plaintiff's appeal the pre-trial conference earlier fixed for that day. In this Order, the District Court stated that defendant's motion under Rule 60(b) had been granted "for the reason that the Court was of the view that since negotiations had previously been conducted by counsel for the parties and since counsel on behalf of the plaintiff knew of the identity of defendant's counsel and nevertheless proceeded to secure default judgment without apprising a fellow member of the bar of said fact or failing to have notice given to him through the United States Clerk of Courts, it was my judgment that the interests of justice required that said default judgment be lifted."

On this appeal plaintiff contends that the District Court (1) abused its discretion in vacating the default judgment and (2) acted arbitrarily in denying plaintiff an

*It is agreed by the parties that plaintiff's counsel was still in possession of the $750.00 check when the instant appeal was filed on September 26, 1961; that the check was not returned by plaintiff's counsel to defendant's counsel until December 1, 1961.

opportunity to answer defendant's motion under oath[1] and in failing to comply with its Local Rule providing that a motion filed on or before the third Wednesday of the month was to be heard by the miscellaneous judge during the following month.

In reply, defendant says that the District Court's Order vacating the default judgment is interlocutory and therefore not appealable. It further urges that the District Court did not abuse its discretion or act arbitrarily and that the Local Rule relied on by plaintiff was not applicable in view of the emergency situation created by the garnishment proceedings.

At the outset, it should be noted that plaintiff does not contend that the District Court acted beyond its jurisdiction in vacating the default judgment as was the case in Demeretz vs. Daniels Motor Freight, — F.2d — (3d Cir. 1962). Plaintiff asserts only that there was an abuse of discretion and certain procedural irregularities. With respect to these contentions, we need only say that we do not reach them since the Order of the District Court vacating the default judgment is a nonappealable interlocutory order, and accordingly we are without jurisdiction to entertain this appeal. United States vs. Agne, 161 F.2d 331 (3d Cir. 1947).[2]

Plaintiff requests that we treat the appeal as a petition for writ of mandamus or prohibition if we consider

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[1]Defendant's motion set forth the circumstances pertaining to the failure to enter an appearance and file an answer and was accompanied by an affidavit by defendant's counsel that the facts as stated were true. At the hearing before the District Court, plaintiff's counsel was afforded an opportunity to explain the circumstances surrounding the securing of the default judgment. The trial judge stated that he would treat counsel's explanation, although unsworn as having been made under oath, inasmuch as counsel was an officer of the Court.

[2]We cannot subscribe to the view expressed in the dissenting opinion that the Order vacating the default judgment is appealable under Tozer vs. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951). In that case the District Court *dismissed* a motion by the defendant to set aside a default judgment and the appealability of the District Court's action was not at issue since it was a "final decision" in that it *terminated* further proceedings. In the instant case the order vacating the default judgment was interlocutory inasmuch as it contemplated further proceedings in the lower court.

the Order nonappealable. Assuming, arguendo, that an appeal may be so treated, we are of the opinion that the use of the writ is inappropriate here. It is settled that "the extraordinary writs cannot be used as substitutes for appeals. . . ." Bankers Life & Casualty Co. vs. Holland, 346 U. S. 379,383 (1953). There are no "exceptional circumstances" here which would justify the issuance of the writ. LaBuy vs. Howes Leather Co., 352 U. S. 249,256,260 (1957); Green vs. Murphy, 259 F.2d 591, 594 (3d Cir. 1958).

For the reasons stated the appeal will be dismissed.

APPENDIX B

McLAUGHLIN, *Circuit Judge*, dissenting.

The setting aside of the judgment in this case was an abuse of discretion and arbitrary. Therefore it is appealable. Tozer vs. Krause Milling Co., 189 F.2d 242 (3 Cir. 1951).

The complaint in the suit was filed June 6, 1960. The summons was served June 7, 1960. After service, an attorney saying he represented the defendant telephoned plaintiff's attorney and asked him for an extension of time to answer. Plaintiff's attorney said he would agree to any reasonable extension of time. The other attorney sent a letter to plaintiff's attorney saying he would have an order prepared "to be executed by the Court and signed by you, the early part of the week beginning June 20, 1960." This was not done and no answer or other pleadings were filed on behalf of the defendant. The case appeared on the trial list for December 29, 1960. The district court clerk advised the defendant of this and that the case would be called for trial in January or February of 1961. The clerk told defendant there was no appearance entered for it and suggested it obtain counsel.

Plaintiff's attorney was notified by the clerk that the action would be tried during the week of February 13,

1961. On that date, almost eight months from the inception of suit, plaintiff had a default judgment entered. Notice of that was mailed defendant by the clerk. There were no further proceedings until six months later when execution was issued. It was only after that, on September 8, 1961, that the attorney entered an appearance on behalf of the defendant and moved to vacate the judgment.

Thereafter there was informal argument on the motion before the court. There was no testimony. That procedure was directly contrary to the district court rule which required the motion to be assigned to the next session of the particular branch of the court. The judge stated, "I think counsel for the defendant was grossly derelict in duty in not complying with the provisions of law as they exist in the United States Courts." He further said "Should the Court exercise discretion and grant relief where a defendant flagrantly fails to comply with the rules of this Court and flagrantly pays no attention to letters that go out from the Clerk of Court and a default judgment is entered?" Then he vacated the judgment on the condition that the plaintiff's attorney be paid $750. On September 13, 1961 an order setting aside the judgment on that term was entered "For the reasons set forth in hearing held September 12, 1961, * * *". A check was thereafter sent plaintiff's attorney which he refused to accept and returned to defendant's attorney.[1] On September 26, 1961 plaintiff appealed from the order reopening the judgment. The original record of the litigation was mailed by the district court clerk to this court for filing. On November 13, 1961 while the case was on appeal to this court the district judge

[1]After the judgment of the district court was affirmed by this court, on January 16, 1962, defendant's attorney again sent the check to plaintiff's attorney saying "Now in the light of the U. S. Court of Appeals action vacating the judgment against us, I am returning herewith the heretofore mentioned check pursuant to Judge Gourley's original order." On March 9, 1962, this court vacated its judgment above mentioned and relisted the appeal for argument which was had May 15, 1962. Plaintiff's attorney retained the check pending disposition of this appeal until July 26, 1962, on which date he again returned it to defendant's attorney.

entered an order in the matter postponing a pretrial conference. In that order the court said, "* * * it was my judgment that the interests of justice required that said default judgment be lifted." This was the first and only time such reason was assigned by the court to its order of more than a month previous.

On the bare statement of what actually happened there was both such abuse of discretion and arbitrary conduct on the part of the trial court "that the interests of justice" call for the reversal of the reopening of the judgment in question. This is no snap judgment which is before us. A most reputable attorney waited fifteen months before taking any final steps in the cause. The court found the other side guilty of gross negligence. It never accorded plaintiff an opportunity to protect his judgment but brushing aside its own salutary rule, peremptorily set aside the judgment and after that when the case was in this court on appeal ascribed as the reason for so doing "that the interests of justice required that said default judgment should be lifted." Under the facts the district court order cannot be fairly sustained.

APPENDIX C

28 U. S. C. A. § 1291 provides: §1291. "FINAL DECISIONS OF DISTRICT COURTS. The court of appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands except where a direct review may be had in the Supreme Court."

28 U. S. C. A. Rule 60(b) Federal Rules of Civil Procedure: "(b) Mistakes, Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of

review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949."

CERTIFICATE OF SERVICE

I certify that I have served five copies of the foregoing Petition with SAMUEL GOLDSTEIN, *Esq.*, attorney for the defendant, personally.

_____

Attorney for Petitioner

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NO. 518

WILLIAM A. CROWE, Trading as
WILLIAM A. CROWE COMPANY,
Petitioner,

v.

RAGNAR BENSON, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	PAGE
Opinion Below	2
Question Presented	2
Statement of the Case	10
Reasons Why the Writ Should Be Denied	10

TABLE OF CASES CITED

Altrichter v. Shell Oil Company (8th Cir. 1959), 263 F.2d 377 17

Darlington v. Studebaker-Packard Corp. (7th Cir. 1959), 261 F.2d 903 19

Demeretz v. Daniels Motor Freight (3d Cir. 1962) F.2d 10

General Telephone Corporation v. General Telephone Answering Service (5th Cir. 1960), 277 F.2d 919 16-17

Russell v. Cunningham (9th Cir. 1960), 279 F.2d 797 19-20

Sleek v. J. C. Penney Co. (3d Cir. 1961) 292 F.2d 256 13

Stathatos, et al. v. Arnold Bernstein S. S. Corp. (2d Cir. 1952), 202 F.2d 525 15

Tozer v. Krause Milling Co. (3d Cir. 1951), 189 F.2d 242 ..... 10, 11

Tsai v. Rosenthal (8th Cir. 1961), 297 F.2d 614 18-19

United States v. Agne (3d Cir. 1947), 161 F.2d 331 ..... 10, 12-13

Weilbacker v. Winchester & Co., (2d Cir. 1952), 197 F.2d 303 15

Western Union Telegraph Company v. Dismang (10th Cir. 1939), 106 F.2d 362 16

QUESTION PRESENTED

Is an Order by a District Court, under Rule 60(b), Federal Rules of Civil Procedure, granting a motion to vacate a default judgment interlocutory and, therefore, not appealable where it appeared (a) that a very large money judgment had been entered by the Clerk for default of an appearance and answer, (b) where the defendant has a full and complete defense on the merits, (c) that no intervening rights appear to have been prejudiced, (d) that no significant reason had been raised for precluding a trial on the merits, and (e) that plaintiff's counsel, knowing the identity of defendant's counsel and having conducted negotiations for settlement with him, nevertheless proceeded to secure default judgment?

STATEMENT OF THE CASE

The decision of the United States Court of Appeals for the Third Circuit, concerning which petitioner seeks a writ of certiorari, affirmed the Order of the District Court entered September 12, 1961 in granting respondent's motion under Rule 60(b), Federal Rules of Civil Procedure, to vacate a default judgment in the amount of $35,603.37 entered on February 13, 1961 (A. 2a, 58a-59a).[1] The default judgment was entered by the Clerk of the District Court under Rules 55(a) and (b) in an action by petitioner for compensation for additional work and services alledgedly rendered by him under a contract between respondent and petitioner dated July 31, 1958 in connection with the construction of the Gateway Park Garage, Gateway Center, Pittsburgh, Pennsylvania.

The respondent on September 8, 1961 filed its motion to vacate the default judgment setting forth the facts upon which it based its request for this relief (A. 8a-34a). The motion was supported by an affidavit by Samuel Y. Stroh, counsel for the respondent, that the facts set forth therein are true and correct. On September 12, 1961, a hearing on said motion was held before the Honorable Wallace S. Gourley, Chief District Judge. The respondent's motion was heard on the basis of the facts set forth in the motion as supported by the accompanying affidavit and on the basis of the statements made by the counsel for the petitioner and the counsel for the respondent during the hearing (A. 52a-53a).

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1. "A" refers to the Brief and Appendix for Appellant filed in the Court of Appeals. "AE" refers to the Brief and Appendix for Appellee filed in said Court.

The motion to vacate judgment under Rule 60(b), Federal Rules of Civil Procedure, and to stay proceedings under Rule 62, Federal Rules of Civil Procedure, set forth the following reasons for relief: that the complaint in this case was filed and summons issued thereon on June 6, 1960, and service was made on respondent on June 7, 1960; that on June 17, 1960 respondent retained Samuel Y. Stroh, Esq. to represent it in its defense to said action; that on June 17, 1960, respondent's counsel telephoned Vincent M. Casey, Esq., attorney for the petitioner, and advised him that he was counsel for the respondent; that the parties orally agreed that respondent's counsel be allowed additional time to file an answer to the complaint; that thereafter, respondent's counsel wrote a letter dated June 17, 1960 to petitioner's counsel confirming said telephone conversation and requesting that petitioner's counsel sign and return a copy of said letter to him agreeing to an allowance of additional time to file respondent's answer; and that on June 21, 1960, petitioner's counsel wrote a letter to respondent's counsel returning therewith a copy of the letter from respondent's counsel dated June 17, 1960 duly signed by him on June 21, 1960 and agreeing to consent to a formal Order of Court extending the time within which to file said answer for a reasonable period of time.

In its motion, respondent further alleged that counsel for respondent had inadvertently not filed an appearance or defensive pleading to the complaint in this action for the following reasons (A. 9a-11a): (a) that between June 17, 1960 and September 1961, respondent's counsel had had several conversations with petitioner's counsel wherein it was orally agreed that he would be given addi-

tional time within which to file said answer, (b) that during said conversations counsel for the parties had discussed the possibility of effecting a mutually satisfactory settlement and had agreed to discuss such possibility of settlement with their clients, (c) that petitioner's counsel at no time prior to February 13, 1961 had given any notice, oral or written, to respondent's counsel that he intended to proceed under Rule 55(a) to request the Clerk of the District Court to make an entry of default and under Rule 55(b)(1) to request the Clerk to enter judgment by default, (d) that between the period from February 13, 1961 to September 1, 1961, when respondent's counsel first learned of the default judgment when garnishment proceedings were instituted by counsel for petitioner, petitioner's counsel had not given any notice, oral or written, to respondent's counsel that he had secured default judgment against respondent on February 13, 1961, (e) that respondent's counsel had had a conversation with petitioner's counsel at some date in March or April, 1961 (after entry of the default judgment), wherein petitioner's counsel orally agreed that respondent's counsel could have additional time to file said answer, and at no time during this conversation did he notify respondent's counsel that default judgment had been entered on February 13, 1961, (f) that between June 17, 1960 and September 1, 1961, respondent's counsel had investigated the case preparatory to the proposed filing of an answer to the complaint and preparatory to determining whether or not the claim should be amicably settled, (g) that between June 17, 1960 and September 1, 1961, respondent's counsel had been unable for certain periods of time to devote all his attention to his practice due to the serious illnesses of his mother and wife, and

(h) that respondent's counsel first learned on September 1, 1961 that entry of default and entry of default judgment had been rendered against the respondent on February 13, 1961, when attachment executions were issued against respondent's bank accounts at the Gateway Center Branch of the Pittsburgh National Bank and the Gateway Center Branch of Mellon National Bank and Trust Company, both of Pittsburgh, Pennsylvania.

In its motion, the respondent further averred that it has a complete, valid and substantial defense upon the merits to the petitioner's action, that it had intended to file this defense provided that an amicable settlement had not been reached, but did not do so under the mistaken belief or misunderstanding between counsel for respondent and counsel for petitioner that counsel for respondent would be allowed additional time to file an answer to the complaint and to explore with respondent the possibility of effecting an amicable settlement of petitioner's action. Respondent's counsel did not file an answer to the complaint because he mistakenly supposed that he would not have to do so as long as settlement negotiations were still in progress (A. 12a).

In its motion, respondent alleged that it has a complete, valid and substantial defense upon the merits to petitioner's action because (a) the additional services allegedly rendered by petitioner were embraced within the terms of the original contract, (b) the additional services allegedly rendered by petitioner were not in fact performed by him as alleged in the complaint, and (c) the charges made for alleged additional services were not reasonable charges. Further, respondent claimed that it has a counterclaim arising from the petitioner's breach

of the contract in failing to complete performance within the time provided in the contract and otherwise failing to perform in accordance with the terms of the contract and the specifications and drawings appurtenant thereto. Respondent attached to its motion a copy of its proposed answer and counterclaim (A. 12a-13a, 18a-33a).

Further, in its motion, respondent alleged that the default judgment entered by the Clerk of the District Court pursuant to Rule 55(b)(1) on February 13, 1961 was void for the reason that the petitioner's claim against the respondent was not for a sum certain or for a sum which by computation could be certain (A. 13a-14a).

Further, in its motion, respondent alleged as further grounds for relief: (a) the enforcement of the default judgment would result in an unjust enrichment to the petitioner, and (b) the respondent's delay in filing an answer to the complaint had not prejudiced the petitioner (A. 14a).

The following facts were developed at the hearing on September 12, 1961 on respondent's motion before the District Court, which had the entire record in the case before it (A. 36a-37a): (1) that respondent's counsel had not entered a formal appearance or an answer before February 13, 1961 when petitioner's counsel had actual notice that Stroh had been retained as counsel by respondent and had discussed the possibility of an amicable adjustment of petitioner's action; (2) that, even though he knew that Stroh was respondent's counsel, petitioner's counsel nevertheless (a) before February 13, 1961 gave him no notice, oral or written, that he intended to take default judgment, and (b) after February 13, 1961, gave him no notice, oral or written, that he had

done so; (3) that, although petitioner's counsel knew that Stroh was counsel for respondent, he did not advise the Clerk's office that respondent was represented by counsel when he applied for the entry of default judgment on February 13, 1961; (4) that respondent did not learn that the default judgment had been entered on February 13, 1961 until about September 1, 1961, when attachment executions were served on the respondent and upon the garnishee banks; (5) that a substantial amount was involved in this litigation—$35,603.57; and (6) that there were no superseding or intervening equities that would make it unjust to grant the requested relief.

After argument upon the motion, the District Court entered an Order granting the prayer of the motion and vacating the default judgment on condition that respondent's counsel pay for the use of petitioner's counsel the amount of $750.00 within three days from September 12, 1961 (A. 52a-54a, 58a-59a). Petitioner on September 26, 1961 appealed to the Court of Appeals from this Order.

In a Memorandum Order entered November 13, 1961, the District Court states its reason for vacating the default judgment (AE 1b):

> "While serving as Miscellaneous Judge, upon petition of counsel for the defendant this Court vacated entry of default judgment for the reason that the Court was of the view that since negotiations had previously been conducted by counsel for the parties and since counsel on behalf of the plaintiff knew of the indentity of defendant's counsel and nevertheless proceeded to secure default judgment without apprising a fellow member of the bar of said

fact or failing to have notice given to him through the United States Clerk of Courts, it was my judgment that the interests of justice required that said default judgment be lifted."

Respondent on December 4, 1961 filed a Motion to Dismiss the Appeal on the ground that the Order appealed from was interlocutory and, therefore, not appealable (AE 3b-6b). After argument before this Court, consisting of McLaughlin, Kalodner and Hastie, Circuit Judges, on December 18, 1961, this Court in a Per Curiam Opinion filed January 9, 1962, affirmed the Order of the District Court vacating the default judgment, stating that:

"... under all the circumstances we are not prepared to say that the District Judge abused his discretion in opening the judgment." (AE 7b).

Petitioner, thereafter, on February 2, 1962 filed a petition for Rehearing. This Court, consisting of McLaughlin, Kalodner and Hastie, Circuit Judges, on March 9, 1962, vacated the Opinion and judgment in his case, filed January 9, 1962, and ordered this Appeal to be listed for hearing on the merits in the week of May 14, 1962 (AE 9b).

The Court of Appeals, after argument thereupon on May 15, 1962, affirmed the judgment of the District Court. The Court of Appeals thereafter on September 10, 1962 denied petitioner's Petition for Rehearing.

REASONS WHY THE WRIT SHOULD BE DENIED

The Court of Appeals in affirming the Order of the District Court stated (307 Fed. 2d 73, at page 75):

> "At the outset, it should be noted that plaintiff does not contend that the District Court acted beyond its jurisdiction in vacating the default judgment as was the case in Demeretz v. Daniels Motor Freight, —F.2d— (3d Cir. 1962). Plaintiff asserts only that there was an abuse of discretion and certain procedural irregularities. With respect to these contentions, we need only say that we do not reach them since the Order of the District Court vacating the default judgment is a nonappealable interlocutory order, and accordingly we are without jurisdiction to entertain this appeal. United States v. Agne, 161 F.2d 331 (3d Cir. 1947)."

Petitioner here urges the granting of the writ of certiorari on two grounds: (1) that the Court of Appeals for the Third Circuit allegedly incorrectly applied the law on this subject applicable in the Third Circuit; and (2) that there is allegedly a conflict between the various Courts of Appeals on the issue of the appealability of an Order granting a motion to vacate a default judgment.

1. The Order Vacating the Default Judgment Was Not Appealable Under the Decisions in the Third Circuit.

The first reason for granting the writ submitted by the petitioner is that the Order vacating the default judgment was appealable under the Court of Appeals decision in *Tozer v. Krause Milling Co.* (3 Cir. 1951), 189 F.2d 242. Petitioner in advancing this reason over-

looks two material points: (a) that a conflict in the decisions in a Circuit Court of Appeals is not a reason for the allowance of a writ of certiorari under Supreme Court Rule 19(b), and (b) that the facts in the *Tozer Case* were not similar to those in this proceeding. In disposing of the minority opinion of McLaughlin, Circuit Judge, dissenting, that "The setting aside of the judgment in this case was an abuse of discretion and arbitrary." (and) Therefore it is appealable", Kalodner, Circuit Judge, in the majority opinion, stated:

> "We cannot subscribe to the view expressed in the dissenting opinion that the Order vacating the default judgment is appealable under Tozer v. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951). In that case the District Court *dismissed* a motion by the defendant to set aside a default judgment and the appealability of the District Court's action was not at issue since it was a 'final decision' in that it *terminated* further proceedings. In the instant case the order vacating the default judgment was interlocutory inasmuch as it contemplated further proceedings in the lower court".

Therefore, respondent submits that, even assuming that the reason herein advanced by petitioner were a ground for granting certiorari, nevertheless, the decision rendered by the Court of Appeals in this case was and is not in conflict with the decision of that Court of Appeals on the same matter in *Tozer v. Krause Milling Company, supra.*

2. That the Court of Appeals Decision in This Case Is Not in Conflict With the Decisions of Other Courts of Appeals on the Same Matter.

Petitioner contends that the decision below conflicts with the decisions of other Courts of Appeals on the same matter. Petitioner, however, misstates the issue involved in this case. Petitioner contends that there is a conflict among the Circuits as to whether an Order opening a default judgment entered arbitrarily and by a Judge who abuses his discretion is final and appealable. The matter involved in this case is, as stated by the Court of Appeals, whether the Order of the District Court vacating the default judgment is a nonappealable interlocutory order.

The Court of Appeals had no statutory jurisdiction to review at this stage an Order of the District Court granting defendant's motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate the default judgment theretofore entered by the Clerk of the District Court.

As stated by the Court of Appeals for the Third Circuit in *United States v. Agne*, 161 F.2d 331 (3d Cir. 1947), at pages 331-332:

> "The first question presented to us on the appeal and the one which we think concludes the matter at this stage of the proceeding is whether the order is appealable. No citation of authorities is necessary for the proposition that the jurisdiction of a Circuit Court of Appeals is statutory. Unless the cause comes to us within the statutory grant of power we have no authority to deal with

it. Certain interlocutory orders are by statute made appealable, but no one suggests that the present case falls within any of these."

Cf. *Sleek v. J. C. Penney Co.* (3d Cir. 1961) 292 F.2d 256.

The general grant of appellate jurisdiction to review by appeal final decisions of the District Courts is found in Title 28 US.C., Sec. 1291:

§ 1291. *Final decisions of district courts*

The courts of appeals shall have jurisdiction of appeal from all final decisions of the district courts of the United States District Court for the District of the Canal Zone, the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e). 72 Stat. 348.

The grant of appellate jurisdiction to review by appeal certain interlocutory decisions of the District Courts if found in Title 28 U.S.C., Sec. 1292, which, briefly, states:

"The Court of Appeals shall have jurisdiction of appeals from

(1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions.

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships . . .

(3) Interlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases . . .

(4) Judgments in civil actions for patent infringement . . .

(b) When a District Judge, in making a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . ."

Barron & Holtzoff, Federal Practice and Procedure, Wright ed., Volume 3A, Section 1552, pages 56-57, summarizes the decisions of District Courts reviewable by Courts of Appeals as follows:

"The courts of appeals have jurisdiction of appeals from final decisions of district courts except those reviewable on direct appeal to the Supreme Court. Some interlocutory decisions are appealable. The statute providing for appeals from interlocutory decisions is neither augmented nor diminished by these rules which regulate procedure and having nothing to do with jurisdiction."

See also *Barron & Holtzoff, Federal Practice and Procedure,* Wright ed., Volume 3, Section 1332, pages 433-438; and *Moore's Federal Practice,* Volume 7, 2d Ed. (1955), page 334.

Reasons Why the Writ Should Be Denied.

In *Weilbacker v. Winchester & Co.* (2d Cir. 1952), 197 F.2d, 303, the Court of Appeals for the Second Circuit said at page 305:

> "At the outset we must determine whether the order appealed from is a final order within the purview of Sec. 1291 of the Judicial Code. 28 U.S.C.A. § 1291. Obviously, the objective of that section is to forestall appellate review when the decision below has but an inconclusive effect on the final outcome of the litigation. This is best illustrated in the example of a motion, also under Rule 60(b), to reopen a default judgment. Thus, the denial of such a motion is a final order. Tozer v. Charles A. Krause Milling Co., 3 Cir. 189 Fed. 2d 242, for by its decision the district court has indicated that no further action will be taken at that level which will change the outcome and unless the order is appealable the controversy is at an end. On the other hand, the granting of the motion is not reviewable. United States v. Agne, 3 Cir., 161 Fed. 2d 331, since the ultimate disposition of the case may not be affected thereby."

In *Stathatos, et al. v. Arnold Bernstein S. S. Corp.* (2d Cir. 1952), 202 F.2d 525, the Court of Appeals for the Second Circuit said at page 527:

> ". . . while denial of a motion under F. R. 60(b) may lead to an appealable order of the grounds therein taken, see United States v. Wissahickon Tool Works, 2 Cir., 200 F.2d 936, it seems apparent, as stated in 3 Moore's Federal Practice 3278, 1st Ed. 1938, that grant does not. At most the process

leads only to a new trial, a step settled to be not reviewable. See Barbarino v. Stanhope S. S. Co., 2 Cir. 150 Fed. 2d 54, F. R. 59, 73(a)."

The decisions cited by the petitioner do not support his contention that the decision in this case conflicts with the decisions of the other Courts of Appeals on the same matter:

In *Western Union Telegraph Company v. Dismang* (10th Cir. 1939), 106 F.2d 362, the question of the appealability of an Order vacating a default judgment was not even raised. The *Western Union Case* involved an action for personal injuries, where a jury had originally rendered a verdict for the plaintiff and the Trial Judge thereafter, after concluding that a motion for a directed verdict should have been sustained, set aside the jury's verdict and rendered judgment for the defendant. The District Court therein, acting upon plaintiff's request to dismiss the cause without prejudice, ordered the judgment for defendant to be set aside. The Telegraph Company appealed from the latter Order. The sole issue in that case was one of jurisdiction—namely, whether the District Court had jurisdiction to dismiss without prejudice after having rendered judgment for defendant.

General Telephone Corporation v. General Telephone Answering Service (5th Cir. 1960), 277 F.2d 919, involved a default judgment entered in favor of the plaintiff in an action for injunctive relief. The District Court entered an Order granting the motion of defendant to set aside the default judgment. The Court of Appeals for the Fifth Circuit held that where default judgment, entered by a District Court without a hear-

ing and without proof of any kind, was a completely drastic judgment with wide and comprehensive injunctive effect, and if there was in reality a defense to the sweeping claim of plaintiff, it would be a great injustice for judgment to stand, the District Court did not abuse its discretion in vacating the default judgment. The question of the appeal of the Order vacating the default judgment was not raised before the Court of Appeals, apparently for the reason that the jurisdiction of the Court of Appeals to entertain appeals for interlocutory orders of District Courts dissolving injunctions is based upon Title 28 U.S.C. Sec. 1292.

Altrichter v. Shell Oil Company (8th Cir. 1959), 263 F.2d 377, clearly does not support petitioner's contention. This was an action brought by plaintiff to recover damages for personal injuries. At the first trial a verdict was rendered for plaintiff in the sum of $27,500.00. Defendant moved for a judgment notwithstanding the verdict, or for a new trial. The District Court granted the motion for new trial. A second trial was had, resulting in a verdict for defendant. The appeal was by the plaintiff from the judgment entered on the jury's verdict. The Court of Appeals in the *Altrichter Case* merely stated that the ruling on the motion of defendant after the first trial presented a question of law reviewable on appeal after the second trial. It stated that:

> "... If this ruling of the court constituted error as a matter of law, then plaintiff would be entitled on this appeal to have the original verdict and judgment returned and entered on the first trial of the case restored ..." (263 F.2d 377, 379)

It is apparent, therefore, that petitioner herein did not lose his right to appeal from the Order of the District Court vacating the default judgment. This right of review is merely held in abeyance until after a trial on the merits and an adverse judgment against the petitioner.

In *Tsai v. Rosenthal* (8th Cir. 1961), 297 F.2d 614, the plaintiff appealed from an Order of the District Court granting the defendant's motion for a new trial, which the District Court had no jurisdiction to grant in the first place under Rule 50(b), Federal Rules of Civil Procedure, after ten days following the verdict. Plaintiff Tsai had brought an action to recover damages for personal injuries received in a three-car collision against Mound Motors, Inc. and Rosenthal, operators and owners of two of the three involved motor vehicles. In that case, both plaintiff and defendant appealed from an Order of the District Court which set aside a judgment entered upon special verdicts returned by the jury which awarded plaintiff damages against defendant, Mound Motors, Inc., denied plaintiff relief against the defendant Rosenthal and denied Mound Motors, Inc. relief on its cross-complaint against Rosenthal. The Court granted a new trial on plaintiff's claim against the defendants, Mound and Rosenthal, limited to the issue of damages. On an appeal, the parties treated the questions presented as jurisdictional questions—namely, whether the District Court had power or jurisdiction to order a new trial upon its own motion, since the Court had not acted within ten days after the entry of judgment. The Court of Appeals held the matter was reviewable on appeal and stated:

"Where the jurisdiction of the court to vacate judgment and grant a new trial is challenged, an

appeal will lie to review the power or jurisdiction of the court to make such order. Phillips v. Negley, 117 U.S. 665 . . ." (297 F.2d 614, 616)

The Court of Appeals stated:

"It is undisputed that the court action here took place more than ten days after verdict and the entry of the judgment Thus the court was without jurisdiction to grant a new trial upon its own motion as it purported to do . . . (and) . . . also lacked jurisdiction to grant a new trial limited to damages only . . ." (297 F.2d 614, 617).

The decision in *Darlington v. Studebaker-Packard Corp.* (7th Cir. 1959), 261 F.2d 903, involved an appeal in a patent infringement action from an Order of a District Court denying plaintiff's motion that he disqualify himself to hear a motion to vacate a judgment of dismissal for non-prosecution. The Court of Appeals had jurisdiction to hear the appeal in the *Darlington Case* under 28 U.S.C.A. Section 1291, for the appeal was obviously from a *final* judgment of the District Court *denying* a motion filed pursuant to Rule 60(b) to vacate a judgment of dismissal.

Russell v. Cunningham (9th Cir. 1960), 279 F.2d 797, involved an appeal from an Order of the District Court of Guam *denying* the plaintiff's motion for relief from an order of dismissal with prejudice for lack of prosecution and also involved an appeal from an Order of the District Court for the Northern District of California dismissing plaintiff's complaints insofar as they stated any claims against the principal defendant. The principal question in the *Russell Case* was whether the

denial of a motion under Rule 60(b) was appealable. The Court of Appeals for the Ninth Circuit merely affirmed the rule that an order denying a 60(b) motion *terminates* proceedings in the District Court and therefore is a final and appealable order. The issue was not whether an order granting a motion under Rule 60(b) was appealable.

Therefore, it is apparent that petitioner has failed to ditstinguish between (1) the decisions involving appeals from Orders wherein the District Courts acted beyond their jurisdiction in vacating default judgments, and (2) decisions involving appeals from Orders where the appellant merely alleges that the District Courts abused their discretion in vacating default judgments. As pointed out by Kalodner, Circuit Judge:

> "... it shouldbe noted that plaintiff does not contend that the District Court acted beyond its jurisdiction in vacating the default judgment as was the case in *Demeretz v. Daniels Motor Freight*, ... F.2d ..... (3d Cir. 1962)."

CONCLUSION

Respondent respectfully submits that the Order of the District Court vacating the default judgment has done no harm to petitioner except to require him to prove his case. It has decided nothing against him. All that the Order has done is to give the respondent its day in court. If a jury renders a verdict for petitioner after a trial, the petitioner will be entitled to receive the amount of his claim plus interest and costs. There has never been any claim by petitioner that the respondent is and will be unable to pay any judgment rendered against it. If a jury returns a verdict in favor of the respondent after a trial, then it would be obvious that the petitioner was not entitled to a default judgment in such a substantial amount in the first place.

Wherefore, respondent prays that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit be denied.

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